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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 WENDY A.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.

CASE NO. 2:18-CV-01186-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
17 Defendant's denial of Plaintiff's application for disability insurance benefits ("DIB"). Pursuant
18 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
19 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

20 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
21 erred in her assessment of Plaintiff's migraines at Step Two, Plaintiff's subjective symptom
22 testimony about her migraines, and medical opinion evidence from Dr. Natalia Murinova, M.D.
23 Had the ALJ properly considered Plaintiff's migraines at Step Two, Plaintiff's testimony, and
24 Dr. Murinova's opinion, the residual functional capacity ("RFC") may have included additional

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1 limitations. The ALJ's error is therefore not harmless, and this matter is reversed and remanded
2 pursuant to sentence four of 42 U.S.C. § 405(g) to the Social Security Commissioner
3 ("Commissioner") for further proceedings consistent with this Order.

4 FACTUAL AND PROCEDURAL HISTORY

5 On September 3, 2014, Plaintiff filed an application for DIB, alleging disability as of
6 June 15, 2011. *See* Dkt. 8, Administrative Record ("AR") 15. The application was denied upon
7 initial administrative review and on reconsideration. *See* AR 15. ALJ Kimberly Boyce held a
8 hearing on February 14, 2017. AR 33-77. In a decision dated July 21, 2017, the ALJ determined
9 Plaintiff to be not disabled. AR 12-36. The Appeals Council denied Plaintiff's request for review
10 of the ALJ's decision, making the ALJ's decision the final decision of the Commissioner. *See*
11 AR 1-6; 20 C.F.R. § 404.981, § 416.1481.

12 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by failing to: (1) find her
13 migraines were a medically determinable severe impairment at Step Two of the sequential
14 evaluation process; (2) state clear and convincing reasons to reject Plaintiff's subjective
15 symptom testimony; and (3) provide specific and legitimate reasons to discount medical opinion
16 evidence from Dr. Murinova. *See* Dkt. 10.

17 Plaintiff amended her alleged onset date of disability to July 10, 2012. AR 15.
18 Accordingly, because the ALJ found Plaintiff had sufficient coverage to remain insured through
19 March 31, 2013, the relevant inquiry is whether Plaintiff became disabled between the alleged
20 onset date – July 10, 2012 – and the date last insured – March 31, 2013.¹ AR 15.

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23 ¹ Plaintiff does not dispute this finding from the ALJ. *See* Dkt. 10.
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DISCUSSION

I. Whether the ALJ committed harmless error in assessing Plaintiff's migraines at Step Two.

Plaintiff first argues the ALJ erred by failing to find her migraines² were a severe impairment at Step Two of the sequential evaluation process. Dkt. 10, pp. 3-10. Defendant concedes the ALJ erred in her assessment of Plaintiff's migraines at Step Two, but contends any error was harmless. Dkt. 11, pp. 2-3.

Plaintiff first argues the ALJ erred by failing to find her migraines² were a severe impairment at Step Two of the sequential evaluation process. Dkt. 10, pp. 3-10. Defendant concedes the ALJ erred in her assessment of Plaintiff's migraines at Step Two, but contends any error was harmless. Dkt. 11, pp. 2-3.

² The ALJ refers to Plaintiff's "headaches" and "migraines." *See, e.g.*, AR 18, 19, 22. For clarity, the Court will refer to Plaintiff's impairment as "migraines" and will consider evidence referencing both headaches and migraines in determining whether the ALJ erred.

1 In this case, the ALJ discussed Plaintiff's migraines in the decision when discounting
2 Plaintiff's subjective symptom testimony and the medical opinion evidence. *See* AR 19, 21-25,
3 28-29. The ALJ did not state she considered the limiting effects of Plaintiff's migraines in
4 formulating the RFC or in any other part of her decision. *See* AR 15-31. Moreover, as discussed
5 in detail below, the ALJ's assessments of Plaintiff's subjective symptom testimony and the
6 medical opinion evidence contained error.

7 Because the ALJ's decision does not reflect she considered the limitations caused by
8 Plaintiff's migraines, the Court cannot determine the ALJ's error at Step Two was harmless. *See*
9 *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (quoting *Stout*, 454 F.3d at 1055-56)
10 (“[A] reviewing court cannot consider [an] error harmless unless it can confidently conclude
11 that no reasonable ALJ, when fully crediting the testimony, could have reached a different
12 disability determination.”); *see also Betts v. Berryhill*, 2017 WL 2598889, at *7 (W.D. Wash.
13 June 15, 2017) (finding harmful error at Step Two because “[n]owhere in the ALJ's opinion does
14 she specifically consider the limitations posed by the psoriasis or discuss it in any detail”);
15 *Stansbury v. Astrue*, 2012 WL 368029, at *5 (W.D. Wash. Jan. 3, 2012) (holding the ALJ's Step
16 Two error was harmful because “while the ALJ may have referred to some of the symptoms [the
17 claimant] suffered as a result of bursitis and piriformis syndrome, he did not specifically refer to
18 those conditions and how they may relate to [the claimant's RFC]”).

19 **II. Whether the ALJ provided clear and convincing reasons to discount**
20 **Plaintiff's testimony.**

21 Plaintiff next argues the ALJ failed to provide any clear and convincing reason to
22 discount Plaintiff's subjective symptom testimony about her migraines. Dkt. 10, pp. 10-15.

23 To reject a claimant's subjective complaints, the ALJ must provide “specific, cogent
24 reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (citation omitted).

1 The ALJ “must identify what testimony is not credible and what evidence undermines the
2 claimant’s complaints.” *Id.*; *see also* *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless
3 affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the
4 claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.3d at 834 (citation omitted).
5 While Social Security Administration (“SSA”) regulations have eliminated references to the term
6 “credibility,” the Ninth Circuit has held its previous rulings on claimant’s subjective complaints
7 – which use the term “credibility” – are still applicable.³ *See* Social Security Ruling (“SSR”) 16-
8 3p, 2016 WL 1119029 (Mar. 16, 2016); 2016 WL 1237954 (Mar. 24, 2016); *see also* *Trevizo v.*
9 *Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (noting SSR 16-3p is consistent with existing
10 Ninth Circuit precedent). Questions of credibility are solely within the ALJ’s control. *Sample v.*
11 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess” this
12 credibility determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984).

13 Plaintiff testified at the hearing that during the relevant period, she experienced daily
14 headaches. AR 58. Plaintiff also testified she experienced two to four severe migraines per
15 month during the relevant period. AR 53. When Plaintiff experiences a migraine, she must “lie
16 down in the dark” because sound and light are “intolerable.” AR 53, 64-65. Plaintiff similarly
17 wrote in a Function Report – Adult, completed on January 1, 2015, that when she has a migraine,
18 “it is challenging to do much at all.” AR 231.

19 Plaintiff testified that when she began seeing Dr. Murinova at the headache and migraine
20 clinic in December 2012, she learned “the majority of the daily headaches were rebound
21 headaches from pain medications” she took for fibromyalgia pain. AR 58. Plaintiff can only take
22 two doses per week of “migraine abortive medications,” which means she “cope[s] with a pretty

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24 ³ Because the applicable Ninth Circuit case law refers to the term “credibility,” the Court uses the terms
“credibility” and “subjective symptom testimony” interchangeably.

1 high level of pain before” taking a dose, as she does not know if she will need those doses for
2 worse pain later in the week. AR 58.

3 Plaintiff stated that her daily activities depend on whether she has a migraine that day. If
4 she does not have a migraine, Plaintiff may play video games or be on the computer. AR 59, 64-
5 65. But if Plaintiff has a migraine, she will take migraine medication, lie down with the lights
6 off, and try to sleep. AR 65. If the medication does not help her migraine after two hours, she
7 will take another pill. AR 65. Plaintiff testified she is on the medication Lyrica, which can cause
8 her to fall asleep for up to four hours. AR 67; *see also* AR 238 (Plaintiff writing in the Function
9 Report that Lyrica causes drowsiness and memory issues). She testified medication “sometimes”
10 manages her migraine pain. AR 65. Plaintiff stated her migraine symptoms “have fluctuated”
11 since 2012, as “there have been times when” she had “two to three migraines a week.” AR 65.
12 Moreover, Plaintiff stated that a week before the hearing, she had to drop a non-vocational class
13 because she “missed two out of six classes due to migraines.” AR 64.

14 In assessing Plaintiff’s testimony about her migraines, the ALJ found Plaintiff’s
15 “medically determinable impairments could reasonably be expected to cause the alleged
16 symptoms.” AR 22. However, Plaintiff’s “statements concerning the intensity, persistence and
17 limiting effects of these symptoms are not entirely consistent with the medical evidence and
18 other evidence in the record[.]” AR 22. Specifically, the ALJ discounted Plaintiff’s subjective
19 symptom testimony (1) because Plaintiff was employed prior to the alleged onset date of
20 disability; (2) due to allegedly inconsistent reports regarding the nature and severity of her
21 migraines; (3) in light of her daily activities; and (4) given the objective medical evidence. AR
22 22-25.

1 First, the ALJ rejected Plaintiff's subjective symptom testimony because Plaintiff
2 reported migraines "concurrent[ly] with past gainful employment, which ended for reasons
3 unrelated to her functional capacity." AR 22. A claimant's testimony may be undermined if the
4 ALJ finds the claimant left her job for reasons unrelated to her disability. *See Bruton v.*
5 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). In this case, the ALJ noted that despite reports to
6 treatment providers that she has experienced migraines since she was a teenager, Plaintiff "was
7 gainfully employed between 2005 and December 2008[.]" AR 22. But the record reflects
8 Plaintiff reported worsening migraines near her alleged onset date of disability. On December
9 21, 2012, Dr. Murinova noted Plaintiff reported her headaches and migraines had worsened over
10 the last few months – i.e., near her alleged onset date of July 10, 2012. AR 543. Plaintiff's
11 migraines had become "more constant" and "extremely disabling." AR 543. Dr. Murinova
12 opined the "most likely factor" leading to Plaintiff's worsening headaches and migraines was
13 "the sudden death of her mom" in 2009. AR 545. Dr. Murinova wrote this event "was extremely
14 stressful" and "emotional" for Plaintiff, "who was very closely attached" to her mom. AR 545.
15 Accordingly, the record fails to support the ALJ's finding that Plaintiff's testimony is
16 undermined for her previous work. *See Trevizo*, 871 F.3d at 682 (where a claimant's symptoms
17 occurred after she stopped working, "there is no reason that this prior work would contradict new
18 . . . symptoms").

19 In discounting Plaintiff's migraine testimony for her previous work, the ALJ also noted
20 that, in March 2011, Plaintiff reported to a treatment provider that her most recent job "ended
21 because of budget cuts." AR 22 (citing AR 296-97). Yet Plaintiff alleged disability beginning
22 July 10, 2012 – sixteen months after that report. *See* AR 15. Given the lapse in time between the
23 end of Plaintiff's job and her alleged onset date of disability, the record does not support the
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1 ALJ's inference that Plaintiff sought disability benefits because she was laid off from work. *See*
2 *McGowan v. Astrue*, 2012 WL 5390337, at *5 (W.D. Wash. Oct. 17, 2012) (holding the record
3 did not support the ALJ's finding that the claimant sought disability benefits because she was
4 laid off where "at least a year passed between the time she stopped working" and her alleged
5 onset date of disability). In all, because the ALJ overlooked relevant evidence regarding
6 Plaintiff's worsening migraines and the timing of her alleged onset date of disability, the ALJ's
7 first reason for discounting Plaintiff's migraine testimony is not clear and convincing nor
8 supported by substantial evidence.

9 Second, the ALJ rejected Plaintiff's testimony about her migraines due to purportedly
10 inconsistent statements Plaintiff made about this condition. AR 22. The ALJ remarked:

11 In July 2012, the claimant was referred to a specialist (Dr. Murinova) for migraine
12 headaches. At this time, the claimant told treating physician Dr. [Dane Travis,
13 M.D.] "she has a weird affect with migraines but no real pain." She further
explained that her migraine issues were "not optical but feels like she has made
errors in understanding what someone is saying."

14 When the claimant visited Dr. Murinova in December 2012, she alleged having
15 daily headaches for the prior four years. Contrary to her prior description to Dr.
16 Travis, she now reported having "disabling" pain from her headaches, as well as
17 nausea, light sensitivity, and noise sensitivity. This statement to Dr. Murinova is
incompatible with her other documented treatment records between 2008 and
December 2012, which do not refer to daily disabling headaches. Instead, during
medical care for an acute knee injury in May 2010, the claimant denied having
any health problems.

18 In addition to her inconsistent reporting as to the nature and severity of her
19 headaches, the claimant has also given inconsistent statements about the effects of
20 medication on her headaches.

21 AR 22-23 (citations omitted).

22 In determining how much weight to give to a claimant's testimony, an ALJ may consider
23 "inconsistencies in [the] claimant's testimony." *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir.
24 2005) (citation omitted). Here, the ALJ found Plaintiff's testimony inconsistent because in July

1 2012, Plaintiff reported to Dr. Travis that she suffered from “no real pain” from her migraines,
2 although she reported to Dr. Murinova in December 2012 that her migraines were “disabling.”
3 AR 22. But as explained above, Plaintiff reported to Dr. Murinova in December 2012 that her
4 migraines had “been worse for the last few months.” AR 543. Therefore, this statement is not
5 necessarily inconsistent with Plaintiff’s statement about her migraines to Dr. Travis five months
6 earlier. Further, the ALJ failed to explain how Plaintiff denying that she had any health problems
7 in May 2010, or making allegedly inconsistent statements about her medications, undermine her
8 subjective symptom testimony. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003)
9 (citations omitted) (“We require the ALJ to build an accurate and logical bridge from the
10 evidence to her conclusions so that we may afford the claimant meaningful review of the SSA’s
11 ultimate findings.”). Considering the ALJ’s lack of record support and corroborating reasoning,
12 the ALJ’s second reason for rejecting Plaintiff’s migraine testimony is not supported by
13 substantial evidence in the record.

14 Third, the ALJ found Plaintiff’s subjective symptom testimony about her migraines
15 inconsistent with her daily activities. AR 24-25. There are two grounds under which an ALJ may
16 use daily activities to form the basis of an adverse credibility determination: (1) whether the
17 activities contradict the claimant’s other testimony, and (2) whether the activities of daily
18 living meet “the threshold for transferable work skills.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th
19 Cir. 2007). Here, the ALJ referred to the first ground by claiming Plaintiff’s daily activities
20 were inconsistent with her testimony regarding her “daily disabling headaches.” *See* AR 24-25.
21 Although the ALJ listed several activities and concluded they were “incompatible” with
22 Plaintiff’s “claims of daily headaches,” the ALJ failed to explain *how* any of the cited activities
23 undermined Plaintiff’s testimony. *See* AR 24-25. As the ALJ did not explain “*which* daily
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1 activities conflicted with *which* part of [Plaintiff’s] testimony,” the ALJ erred. *See Burrell v.*
2 *Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (emphasis in original); *see also Lester*, 821 F.3d at
3 834 (citation omitted) (“General findings [of credibility] are insufficient; rather, the ALJ must
4 identify what testimony is not credible and what evidence undermines the claimant’s
5 complaints.”).

6 In addition to lacking the specificity necessary to properly reject Plaintiff’s subjective
7 symptom testimony, this reason lacks support from the record with regards to several of the
8 activities the ALJ cited. For instance, although the ALJ wrote Plaintiff “completed a two-year
9 college degree in the spring of 2011,” Plaintiff testified she had not taken any college courses
10 since that time. *See* AR 24, 47. The ALJ failed to explain how Plaintiff obtaining a college
11 degree nearly 18 months prior to her alleged onset date of disability undermines her testimony.
12 *See* AR 24. As such, this reason lacks support from substantial evidence in the record.

13 The ALJ furthermore noted Plaintiff “had gotten married in June 2012, after which she
14 took a two-week honeymoon to Iceland.” AR 24. The ALJ wrote Plaintiff “affirmed that she had
15 been able to manage her wedding, the event planning, and her honeymoon with the use of
16 medication[.]” AR 24. Nonetheless, at the hearing, Plaintiff stated she “had a lot of help from
17 [her] maid of honor” in planning her wedding. AR 48. Moreover, contrary to the ALJ’s finding
18 about Plaintiff’s honeymoon, Plaintiff testified she “certainly had some migraines while . . . in
19 Iceland.” AR 53. There were some days Plaintiff “tried to leave the [hotel] room,” but “had to go
20 back to the room and lie down.” AR 53. Due to the ALJ’s failure to consider this relevant

1 evidence, the ALJ's reasoning about Plaintiff's wedding and honeymoon is not supported by
2 substantial evidence in the record.⁴

3 The ALJ also found Plaintiff's reports from 2012 and 2016 that she was a "homemaker"
4 incompatible with her "claims of daily headaches[.]" AR 25. Once again, however, the ALJ's
5 finding overlooks relevant evidence in the record. Plaintiff testified at the 2017 hearing that
6 while she previously described herself as a homemaker, she "recently" realized she did not
7 "successfully keep[] up with the demands of homemaking." AR 54. Plaintiff said that while there
8 used to be a "pretense of [her] keeping up with chores . . . dust bunnies and dirty dishes were
9 rampant." AR 54. Thus, considering the ALJ's failure to consider evidence related to Plaintiff's
10 reports of homemaking, this assertion from the ALJ lacks support from substantial evidence in
11 the record, as well.

12 In sum, given the ALJ's lack of reasoning and record support, the ALJ's assertion that
13 Plaintiff's daily activities contradict her subjective symptom testimony about her migraines is not
14 a clear and convincing reason, supported by substantial evidence, to discount this testimony.

15 Lastly, the ALJ discounted Plaintiff's migraine testimony because she found Plaintiff's
16 testimony not supported by the objective medical evidence. *See* AR 22-25. A claimant's pain
17 testimony cannot be rejected "solely because the degree of pain alleged is not supported by
18 objective medical evidence." *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting
19 *Bunnell v. Sullivan*, 947 F.3d 341, 346-47) (9th Cir. 1991) (en banc)). This is true for a claimant's
20 other subjective complaints, as well. *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995)
21 (holding that, although *Bunnell* was couched in terms of subjective complaints of pain, its
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23 ⁴ Likewise, although the ALJ cited Plaintiff's 2015 trip to New York City as a reason to undermine her
24 testimony, the ALJ again failed to consider evidence about the "grueling" pain Plaintiff experienced on this trip. *See*
AR 24, 51.

1 reasoning extends to non-pain complaints). As this is the only remaining reason the ALJ
2 provided to discount Plaintiff's testimony about her migraines, this reason alone is not sufficient.

3 The ALJ failed to provide any clear and convincing reason, supported by substantial
4 evidence, to discount Plaintiff's subjective testimony about her migraines. As such, the ALJ
5 erred. Had the ALJ properly considered Plaintiff's testimony, the RFC and hypothetical
6 questions posed to the vocational expert ("VE") may have contained additional limitations. For
7 example, the RFC and hypothetical questions may have included limitations reflecting Plaintiff's
8 testimony that she experienced two to four severe migraines per month during the relevant
9 period, which required her to lie down in the dark. *See* AR 53, 64-65. The RFC and hypothetical
10 questions posed to the VE did not contain restrictions reflecting the frequency of Plaintiff's
11 migraines, or the impact of light and noise on Plaintiff's functioning when she has a migraine.
12 *See* AR 21, 74-76. Because the ultimate disability determination may have changed with proper
13 consideration of Plaintiff's testimony about her migraines, the ALJ's error is not harmless and
14 requires reversal. *See Molina*, 674 F.3d at 1115.

15 **III. Whether the ALJ provided specific and legitimate reasons to reject Dr.**
16 **Murinova's opinion.**

17 Plaintiff further asserts the ALJ failed to state legally sufficient reasons to discount
18 medical opinion evidence from treating physician Dr. Murinova. Dkt. 10, pp. 15-17.

19 An ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
20 opinion of either a treating or examining physician. *Lester*, 81 F.3d at 830 (citing *Pitzer v. Sullivan*,
21 908 F.2d 502, 506 (9th Cir. 1990)); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). When a
22 treating or examining physician's opinion is contradicted, the opinion can be rejected "for specific
23 and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at
24 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722

1 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and
2 thorough summary of the facts and conflicting clinical evidence, stating [her] interpretation
3 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing
4 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

5 Dr. Murinova is a specialist who has provided Plaintiff with medical care for her
6 migraines since December 2012. *See, e.g.*, AR 530-31, 534, 543-46 (treatment notes). In
7 November 2016, Dr. Murinova provided a medical source statement on Plaintiff’s migraines. AR
8 1072-73. Dr. Murinova wrote that although the frequency of Plaintiff’s migraines has decreased,
9 she continues to experience migraines despite medication compliance. AR 1072. Dr. Murinova
10 opined Plaintiff experiences 4-6 migraines per month, for an average of 12-hours at one time.
11 AR 1072. Dr. Murinova found Plaintiff experiences nausea, photophobia, and phonophobia with
12 her migraines. AR 1072. Dr. Murinova determined that, when Plaintiff has a migraine, she is
13 “unable to concentrate” and “unable to leave her room/house.” AR 1073. Moreover, Dr.
14 Murinova opined that after Plaintiff’s migraine passes, “she experiences severe fatigue.” AR
15 1073.

16 Dr. Murinova wrote Plaintiff has been prescribed two medications for her migraines, one
17 of which (Lyrica) causes “some drowsiness.” AR 1073. Dr. Murinova opined that, if Plaintiff
18 attempted to perform sedentary work on a full-time, regular and sustained basis, her migraines
19 would likely cause her to miss work more than three times per month. AR 1073. Lastly, Dr.
20 Murinova found Plaintiff “reasonable/credible in light of her diagnoses.” AR 1073.

21 The ALJ summarized Dr. Murinova’s opinion and gave it “little weight” for four reasons:

22 (1) [Dr. Murinova] did not refer to any medical evidence to support her
23 assessment of disability. (2) Examinations of the claimant by Dr. Murinova and
24 her associates were wholly unremarkable during the relevant period and
afterwards, with normal neurological findings, normal visual findings, normal

1 gait, normal concentration and memory, and no acute distress. These benign
2 examination findings even occurred during active reported headaches in March
3 2014, February 2015, and March 2015. In other words, Dr. Murinova appears to
4 have no objective basis for her assessments. (3) Dr. Murinova's own treatment
5 notes indicate that her assessment from November 2016 was based on direct
6 dictation from the claimant regarding the frequency, duration, and effects of her
7 headaches. For various reasons discussed earlier in this decision, the claimant's
8 subjective reports regarding the nature and severity of her headaches are not
9 reliable. (4) As already discussed in this decision, the claimant's reports of regular
10 headaches were concurrent with period [sic] of gainful employment (5) and her
11 activities approximate to the relevant period are inconsistent with significant
12 limitations in her stamina, concentration, or ability to maintain a schedule.

13 AR 28-29 (citations omitted) (numbering and emphasis added).

14 First, the ALJ assigned little weight to Dr. Murinova's opinion because Dr. Murinova did
15 not refer to medical evidence to support her findings. AR 28. An ALJ may reject an opinion that
16 is "inadequately supported by clinical findings." *Bayliss*, 427 F.3d at 1216 (citing *Tonapetyan v.*
17 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)). But an ALJ cannot reject a treating physician's
18 opinion for not referencing medical evidence where the opinion is supported by the source's own
19 treatment notes contained in the record. *See Burrell*, 775 F.3d at 1140; *Garrison v. Colvin*, 759
20 F.3d 995, 1014 n.17 (9th Cir. 2014).

21 Here, as discussed in additional detail below, the ALJ's first reason for discounting Dr.
22 Murinova's opinion overlooked that Dr. Murinova's treatment notes are in the record and
23 support her opinion. *See, e.g.,* AR 534 (migraines lessening in intensity in February 2013 but still
24 occurring 5 to 7 days per week; extensive body aches and pain in the temples, eyes, and sinus
problems); AR 530 (in March 2013, Plaintiff "continues to have severe disabling daily
migraines," and discussing with Plaintiff how to treat "her disabling pain"); AR 526 (review of
systems in May 2013 shows "headaches, neck pain, and shoulder pain"); AR 521-23 (in
November 2013, Plaintiff "has chronic daily headaches and a very strong genetic history of
migraines"; review of systems shows headaches, memory trouble, trouble concentrating, lack of

1 energy, and depression). Thus, the ALJ’s first reason for rejecting Dr. Murinova’s opinion is not
2 supported by substantial evidence because the ALJ erroneously overlooked supporting treatment
3 notes. *See Burrell*, 775 F.3d at 1140 (ALJ erred in finding a treating source’s opinion supported
4 by “little explanation,” as the ALJ “overlook[ed] nearly a dozen” relevant treatment notes).

5 Second, the ALJ found Dr. Murinova’s opinion lacked an “objective basis” in view of Dr.
6 Murinova’s “wholly unremarkable” examinations. AR 28. The ALJ noted Dr. Murinova’s
7 examinations contained “normal neurological findings, normal visual findings, normal gait,
8 normal concentration and memory, and no acute distress.” AR 28 (citations omitted). An ALJ
9 cannot reject a physician’s opinion in a vague or conclusory manner. *See Garrison*, 759 F.3d at
10 1012-13 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)); *Embrey*, 849 F.2d at
11 421-22. Rather, the ALJ “must set forth [her] own interpretations and explain why they, rather
12 than the doctors’, are correct.” *Embrey*, 849 F.2d at 421-22.

13 Here, although the ALJ listed several findings from Dr. Murinova’s treatment notes, the
14 ALJ failed to explain how any of the findings undermine Dr. Murinova’s opinion. *See* AR 39.
15 Instead, the ALJ “merely states that the objective factors point toward an adverse conclusion”
16 but “makes no effort to relate any of these” facts to “the specific medical opinions and findings
17 [she] rejects.” *Embrey*, 849 F.2d at 421. “This approach is inadequate.” *Id.* Without more, this is
18 not a specific, legitimate reason, supported by substantial evidence in the record, to discount Dr.
19 Murinova’s opinion. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (“the
20 agency [must] set forth the reasoning behind its decisions in a way that allows for meaningful
21 review”).

22 Furthermore, the ALJ’s finding overlooked objective evidence from Dr. Murinova which
23 was not “wholly unremarkable.” *See* AR 28. At Dr. Murinova’s first appointment with Plaintiff
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1 in December 2012, Dr. Murinova wrote Plaintiff experienced “disabling migraines” associated
2 with “very significant stabbing, throbbing, pressure, aching . . . nausea, light sensitivity, and
3 noise sensitivity.” AR 543. Dr. Murinova remarked Plaintiff’s migraines “fluctuate in intensity.”
4 AR 543. On a review of systems, Dr. Murinova noted Plaintiff experienced a lack of energy,
5 trouble concentrating, trouble sleeping, and ringing in the ears. AR 544. Dr. Murinova observed
6 on physical examination Plaintiff experienced “diffuse tenderness that is consistent with
7 fibromyalgia.” AR 545.

8 In her assessment of Plaintiff’s condition, Dr. Murinova wrote “there is a strong genetic
9 predisposition [for migraines] with very strong environmental factors.” AR 545. Dr. Murinova
10 explained:

11 . . . [T]he current evidence is moving towards . . . the epigenetics where the
12 environment affects the cell environment[,] changing genetic expression that . . .
13 causes . . . chronic pain. We know the number of migraineurs have comorbidity
14 with fibromyalgia, chronic fatigue, insomnia, stomach issues, and [Plaintiff] has
15 all of those. . . [T]he most likely factor that really pushed [Plaintiff] into
16 worsening headaches has been the sudden death of her mom who had cancer in
17 2009. [T]hat was extremely stressful, emotional stress for [Plaintiff] who was
18 very closely attached to her. . . . This then led to a period of physical inactivity
19 and probably worsening of the pain. . . . I have discussed that . . . migraineurs are
20 especially sensitive to getting into rebound headaches with both Tylenol and
21 Vicodin, and she is definitely taking amounts that could push her into worsening
22 daily headaches[.]

23 AR 545.

24 Hence, Dr. Murinova opined the evidence showed Plaintiff’s migraines were caused by
genetic and environmental factors, including medications Plaintiff was taking, and further
associated with Plaintiff’s fibromyalgia and other conditions. *See* AR 545. The ALJ, however,
failed to discuss these findings. Additionally, as discussed below, “there is no test that exists to
establish migraine headache.” *See Bree Lyn C-W. v. Commissioner*, 2018 WL 6331322, at *3
(W.D. Wash. Nov. 15, 2018) (citations omitted). Because the ALJ discounted Dr. Murinova’s

1 opinion without discussing significant, probative evidence from her treatment notes, the Court
2 cannot determine the ALJ's finding is supported by substantial evidence. *See Flores v. Shalala*,
3 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.
4 1984)) (the ALJ "may not reject 'significant probative evidence' without explanation").

5 Third, the ALJ determined Dr. Murinova based her opinion "on direct dictation" from
6 Plaintiff about her migraines. AR 28-29. An ALJ may reject a physician's opinion "if it is based
7 to a large extent on a claimant's self-reports that have been properly discounted as incredible."
8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citation and internal quotation marks
9 omitted). Yet here, as explained above, the ALJ failed to properly discount Plaintiff's subjective
10 symptom testimony about her migraines. *See* Section II., *supra*. Further, this Court has held "a
11 migraine diagnosis is dependent upon the patient's description of symptom patterns." *McPherson*
12 *v. Colvin*, 2015 WL 6692243, at *4 (W.D. Wash. Nov. 2, 2015) (citation and quotation marks
13 omitted). This is because "there is no test that exists to establish migraine headaches." *See Bree*
14 *Lyn C-W.*, 2018 WL 6331322, at *3.

15 Here, the record is replete with treatment notes containing migraine diagnoses and
16 Plaintiff discussing medication management and other treatment options with medical providers
17 for this impairment. *See, e.g.*, AR 521-23, 526, 530-31, 534, 543-46, 1072-73, 1074-77. Plaintiff
18 has also sought specialized care for her migraines. *See, e.g.*, AR 543-46, 1119-28, 1129-37,
19 1074-77, 1082-87. As such, the ALJ's finding that Dr. Murinova's opinion was based on
20 Plaintiff's reports is not a specific and legitimate reason to discount this opinion. *See Thompson*
21 *v. Berryhill*, 2017 WL 4296971, at *1 (W.D. Wash. Sept. 28, 2017) (the Commissioner's
22 argument that no objective evidence supports the claimant's migraines was error, as "no such test
23 exists. . . . This isn't a case in which there is no evidence [the claimant] suffers from chronic
24

1 | headaches. On the contrary . . . medical providers repeatedly state one of his ‘chronic problems’
2 | is ‘chronic post-trauma headache[.]’”); *see also Bree Lyn C-W.*, 2018 WL 6331322, at *3 (in
3 | assessing the claimant’s migraines, the ALJ erred in finding diagnostic imaging “unremarkable,”
4 | as “there is no test that exists to establish migraine headache.”).

5 | Fourth, the ALJ gave Dr. Murinova’s opinion little weight because Plaintiff reported
6 | headaches concurrent with her previous work. AR 29. Yet the ALJ failed to explain how
7 | Plaintiff’s ability to previously work despite her reports of migraines undermine Dr. Murinova’s
8 | opinion. *See* AR 29; *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir.
9 | 2014) (citation omitted) (“the ALJ must provide some reasoning in order for us to meaningfully
10 | determine whether the ALJ’s conclusions were supported by substantial evidence”). As
11 | discussed with respect to Plaintiff’s testimony, the ALJ also failed to consider evidence showing
12 | Plaintiff’s migraines worsened after she stopped working. *See* AR 543, 545. Accordingly, this is
13 | not a specific and legitimate reason, supported by substantial evidence, to reject Dr. Murinova’s
14 | findings.

15 | Fifth, the ALJ discounted Dr. Murinova’s opinion by finding Plaintiff’s activities
16 | “inconsistent with significant limitations in her stamina, concentration, or ability to maintain a
17 | schedule.” AR 29. An ALJ need not accept an opinion which is inadequately supported “by the
18 | record as a whole.” *See Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
19 | 2004). Yet here, the ALJ again provided vague, conclusory reasoning, as she failed to identify
20 | any specific evidence in the record of Plaintiff’s activities and explain how they contradict Dr.
21 | Murinova’s opinion. *See Garrison*, 759 F.3d at 1012-13 (“an ALJ errs when [she] rejects a
22 | medical opinion or assigns it little weight while doing nothing more than . . . criticizing it with
23 | boilerplate language that fails to offer a substantive basis for [her] conclusion”). Moreover, as
24 |

1 the Court previously determined, the ALJ's findings regarding Plaintiff's activities lack
2 support from substantial evidence in the record. *See* Section II., *supra*. As the ALJ failed to
3 adequately explain how Plaintiff's activities undermine Dr. Murinova's opinion, the ALJ's
4 final reason for giving Dr. Murinova's opinion little weight is not specific and legitimate nor
5 supported by substantial evidence.

6 For the above stated reasons, the ALJ failed to provide specific and legitimate reasons
7 supported by substantial evidence for giving little weight to Dr. Murinova's opinion. Therefore,
8 the ALJ erred. Had the ALJ properly considered the opinions of Dr. Murinova, the RFC and
9 hypothetical question may have included additional limitations. As the ultimate disability
10 decision may have changed, the ALJ's error is not harmless. *See Molina*, 674 F.3d at 1115.

11 CONCLUSION

12 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
13 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
14 this matter is remanded for further administrative proceedings in accordance with the findings
15 contained herein. The Clerk is directed to enter judgment for Plaintiff and close the case.

16 Dated this 29th day of January, 2019.

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18 David W. Christel
19 United States Magistrate Judge
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